AVOIDING PITFALLS AND EXPOSING YOURSELF TO LITIGATION FOR SEXUAL HARASSMENT AND DISCRIMINATION

BEST PRACTICES

September 27, 2011

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Susan has expertise in various aspects of employment law including diversity, discrimination, harassment and workers compensation. She represents, consults with and provides education and training to many employers in the state of Utah. Susan received her B.A. from University of Utah in Political Science and her J.D. from the S.J. Quinney School of Law at the University of Utah in 1982 where she was named a Leary Scholar for academic excellence. She also served as a Lyndon Baines Johnson Fellow in the United States House of Representatives.

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1. INTRODUCTORY COMMENTS / PERCEPTIONS

A. Most employers state they are committed to promoting diversity and equal employment opportunity for all employees.

B. Most employers, at least most members of management, have no overt intention to discriminate against any employee on the basis race, creed, color, national origin, disability, gender, sexual preference, age or religion, but some policies, procedures or lack thereof, actions or lack thereof, may have a disparate negative impact on employees that fall into protected classes.

C. In addition, in many places of employment, employees may have perceptions that may or may not be based in reality, but these perceptions have a significant impact on the working environment and culture at the place of employment. These perceptions are demonstrated by comments made by several employees as follow:

"You have to be a white male to get ahead at this place."

"I was told they had to give him the promotion because he has a family to support."

"They assumed that I was going to retire in the next couple years. I have every intention of working another five years, but now they won't consider me for a promotion."

"I would have liked to have been considered for that job, but I never heard about it until after it was given to him."

"She sexually harassed me and I complained and nothing happened. She still got a big promotion after that and now everybody is giving me the cold shoulder like I am the bad guy."

"You have to be careful with him. He's Muslim and, you know you can trust them."

"My boss goes to lunch and golfs frequently with my male peers. The women are never included and I am sure they talk a lot about work. It puts me at a real disadvantage."

"Its just another example of the 'good old boys' club". It will never change."

"The church discourages married members from going to lunch with a member of the opposite sex at work."

"She has two small children at home so I don't think she would like that job that requires a lot of travel."

"I was told they had to pay him more because he has to pay tithing."

"S---s are lazy and don't work as hard as we do."

"He is just a whiner and complainer. He will never be a company person."

"I was told I wasn't qualified because I didn't have the right experience so I got the experience. I was told I didn't have the right education so I got the education. And the promotion still went to the guy who didn't have as much experience or education as I had."

"She is not a "team player" and just doesn't get along."

"You have to have "the look" to get ahead here. What does that mean?"

"There just aren't any women who are qualified and ready to take on that job."

E. If these perceptions are based, in whole or in part, on fact, the employer may have legal issues. But, even if they are not based in fact, the perceptions are very problematic for employers nonetheless. Discouraged and disgruntled employees are not productive, efficient, motivated or effective and their discontent can spread to other employees. These perceptions can cause unnecessary turnover that is costly and disruptive. In addition, employers may be missing the opportunity to tap the full potential and talent of its employees.

F. Numerous studies, including those commissioned by the EEOC, show that employers who best leverage diversity are more profitable, successful and productive.

2. DIVERSITY INTIATIVES AND BEST PRACTICES

A. INTRODUCTORY COMMENTS

The following recommendations for Diversity Initiatives may help to eradicate the perceptions listed above and to accomplish employers' goals of diversity and equal employment opportunity. These recommendations are primarily drawn from what is considered to be "Best Practices" by experts in the fields of equal employment opportunity, diversity, human resources, business, employment law and the EEOC.

B. EMPLOYERS SHOULD GET AND KEEP EDUCATED ABOUT THE LAWS REGARDING DISCRIMINATION AND HARASSMENT

C. EMPLOYERS SHOULD HAVE WRITTEN POLICIES AND PROCEDURES REGARDING WORK PLACE RESPECT

These policies and procedures:

1. Should define illegal discrimination and harassment
2. Should give clear examples of what is prohibited
3. Should describe how, to whom complaints can be made (Open Door)
4. Should state complainants will be given as much confidentiality as is feasible, but cannot be absolute
5. Should state complainants or anyone giving information will be protected against retaliation
6. Should state anyone involved in investigation should keep information as confidential as possible
7. Should provide for timely, thorough and impartial investigations
8. Should provide for appropriate corrective action, including discipline
9. Should state complainant will be advised, in general terms, of the outcome
10. Should be in employees' handbook and employer's policies and procedures manual
11. Should be widely circulated to employees
12. Should be integral part of employee orientation and training

D. EMPLOYERS SHOULD RECRUIT AND HIRE FROM A DIVERSE POOL OF CANDIDATES

1. Develop Job Descriptions that are specific, gender neutral and list objective, authentic job qualifications

2. Interview prospective candidates using the same questions that are legally sound and job specific
3. Use diverse team to interview candidates

E. POSTING OF PROMOTIONAL OPPORTUNITIES

1. Post or announce promotional opportunities through, at least the first level supervisory positions to all employees

2. Notify those who meet minimum qualifications for promotional opportunities to manager and director positions

3. Use information gathered during posting, to counsel candidates who were not selected regarding needs for additional experience, training and education in order to be considered for promotional opportunities in the future.

4. Posting positions allows employees to raise their hands so they can be considered. It allows the company to find out about employees' talents, education and experience and to discover "diamonds in the rough." It allows the company to tailor cross-training and educational programs for employees who show an interest in a position, but are lacking the right background. Posting still afford the company the flexibility to select appropriate candidates if the needs of the business are such. It puts the company in a more legally defensible position.

F. SENIOR MANAGEMENT COMMITMENT TO DIVERSITY AND EQUAL EMPLOYMENT OPPORTUNITY

1. Every member of senior management makes diversity and equal opportunity a professional and personal goal. Every member of senior management communicates and demonstrates his commitment to diversity and equal employment opportunity to the company.

2. Ensure that women and minorities are on every "short list" for promotional or hiring opportunities for every level of management positions.

3. Put diversity and equal employment opportunity as goals on annual performance evaluations for all directors and those in senior management.

4. Consult HR, EEO and Legal departments with every significant promotional opportunity, reorganization and restructuring of the company, divisions or departments in order to ensure diversity goals and objectives are being considered.

5. Actively recruit internally and externally diverse candidates for all positions, especially management positions.

6. Integrate diversity goals and objectives into succession planning. Encourage movement from departments and work groups where traditionally there are more women into departments and work groups where traditionally there are more men.

7. Have diverse teams interview candidates for significant management positions.

8. Have presentation to senior management and board of directors at least twice a year by HR, EEO and Legal departments with status and progress on all diversity goals, objectives and initiatives.

9. Appoint a Diversity Liaison member of the board of directors to advise and consult on Diversity Initiatives.

G. TRAINING AND DEVELOPMENT

1. Conduct education and training sessions for all employees in workplace respect, anti-discrimination and anti-harassment on an annual basis. Conduct more intense workplace respect, anti-discrimination and anti-sexual harassment training of all members of management on an annual basis.

2. Create opportunities for women and minorities for cross-training, project and committee assignments. Consult HR, EEO and Legal departments with every significant cross-training program and project and committee assignment to ensure diversity goals are being considered.

3. Create formal and informal mentoring programs across department and work groups to ensure that women and minorities have opportunities for career development and visibility.

4. Create Women's and Minority Networks at the workplace to ensure women and minorities within the organization have opportunities to meet members of senior management, the Board of Directors and business leaders in the community. Also to further participants' career development, education, training and informal networking.

5. Provide coaching, mentoring, training and support, as needed on a case by case basis, to women and minority supervisors and managers to facilitate success in their positions.

6. Provide education and training to all members of management in effective, meaningful and non-offensive communication, coaching, conflict resolution negotiation skills and techniques.

AVOIDING PITFALLS AND EXPOSING YOURSELF TO LITIGATION FOR SEXUAL HARASSMENT AND DISCRIMINATION

OUTLINE

I. Statutes and Ordinances
   a. Federal Statutes
      i. Americans With Disabilities Amendments Act (ADAAA) (2008) (Public Law 110-325) – Took effect on January 1, 2009
         1. Background
            a. The ADAAA was passed in response to the Supreme Court rulings in *Sutton v. United Airlines*, 130 F.3d 893 (1999) and *Toyota Motor Mfg. KY v. Williams*, 224 F.3d 840 (2002). These rulings, taken together, imposed a strict standard for those claiming disability under the ADA:
               i. Impairments must be considered in their mitigated state.
               ii. The standard for determining disability must be demanding.
               iii. Individuals with impairments such as amputation, intellectual disabilities, epilepsy, Multiple sclerosis, HIV/AIDS, diabetes, muscular dystrophy, and cancer were often not qualifying for protection under the ADA.
         2. Significant Changes
            a. Clarifies and expands the ADA's definition of "disability"
               i. Physical or mental impairment that substantially limits one or more life activities; and either
               ii. A record of such impairment; or
               iii. Being recognized as having such an impairment.
            b. Deletes language used the Supreme Court to restrict the meaning and application of the Act.
            c. States that "disability" shall be construed in favor of a broad coverage of individuals under the Act.
            d. Prohibits consideration of mitigating measures in determining disability.
               i. Also provides that impairments that are episodic or in remission must be assessed in their active state.
            e. Provides additional direction on "major life activities" and "major bodily functions" that constitute disability
               i. "Major Life Activities" (non-exhaustive list)
                  1. Caring for oneself;
                  2. Performing manual tasks;
                  3. Seeing;
                  4. Hearing;
                  5. Eating;

6. Sleeping;
7. Walking;
8. Standing;
9. Lifting;
10. Bending;
11. Speaking;
12. Breathing;
13. Learning;
14. Reading;
15. Concentrating;
16. Thinking;
17. Communicating; and
18. Working.

ii. "Major Bodily Functions" (non-exhaustive list)

1. Functions of the immune system;
2. Normal cell growth;
3. Digestive functions;
4. Bowel functions;
5. Bladder Functions;
6. Neurological functions;
7. Brain functions;
8. Respiratory functions;
9. Circulatory functions;
10. Endocrine functions; and
11. Reproductive functions.

f. Removes the requirement that an individual must demonstrate that the impairment limits a major life activity that is *perceived to be substantial*.

g. The authority granted to federal agencies under the ADA includes the authority to issue regulations implementing the definitions contained in Sections 3 and 4 of the ADA

h. Makes conforming amendments to Section 7 of the Rehabilitation Act of 1973 and Title I of the ADA itself.

ii. Genetic Information Nondiscrimination Act of 2008 (GINA) (Public Law 110-223) – Took Effect May 21, 2008

1. Provisions

a. Prohibits group health plans and health insurers from denying coverage or charging higher premiums to healthy individuals based solely on the genetic predisposition to developing a disease in the future

b. Bars employers from using genetic information in decisions regarding:

i. Hiring;
ii. Firing;
iii. Job placement; or
iv. Promotion

2. Arguments in Favor

a. Helps advance personalized medicine
    i. Encourages continuing biomedical research
    ii. Helps ensure that patients are comfortable consenting to genetic diagnostic tests
b. Helps prevent potential misuse of genetic information
    i. All humans have genetic anomalies

3. Arguments in Opposition
    a. Legislation is overly broad
    b. Might increase frivolous lawsuits and/or punitive damages
    c. Might force employers to offer health plan coverage of all treatments for genetically-related conditions, thus driving up costs

iii. Lilly Ledbetter Fair Pay Act of 2009 (Public Law 111-2) – Took Effect January 29, 2009

1. Background
    a. Reaction to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held:
        i. 180-day statute of limitations in pay discrimination cases begins to run at the time that the pay was agreed upon, not at the time of the last paycheck

2. Provisions
    a. Amendments to § 706(e) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(e))
        i. An unlawful employment practice occurs when:
            1. A discriminatory decision or other practice is adopted;
            2. An individual becomes subject to a discriminatory compensation decision or other practice; or
            3. An individual is affected by application of a discriminatory compensation decision or other practice (including each time wages, benefits or other compensation is paid)
        ii. Aggrieved party may obtain relief, including recovery of back pay, for up to two years preceding the filing of the charge
    b. Amendments to § 7(d) of the Age Discrimination in Employment Act (29 U.S.C. § 626(d))
        i. An unlawful employment practice occurs when:
            1. A discriminatory decision or other practice is adopted;
            2. An individual becomes subject to a discriminatory compensation decision or other practice; or

3. An individual is affected by application of a discriminatory compensation decision or other practice (including each time wages, benefits or other compensation is paid)

b. Utah Statutes
    i. Utah Antidiscrimination Act (U.C.A. §§ 34A-5-101 to -108) – Initially Enacted in 1965
        1. Prohibits employment discrimination on the basis of:
            a. Race;
            b. Color;
            c. National Origin;
            d. Gender;
            e. Religion;
            f. Age;
            g. Disability;
            h. Pregnancy;
            i. Childbirth; or
            j. Pregnancy-related Conditions

c. Local Ordinances
    i. Counties with ordinances prohibiting employment and housing discrimination based on sexual orientation or gender identity
        1. Grand County
        2. Salt Lake County
        3. Summit County
    ii. Cities with ordinances prohibiting employment and housing discrimination based on sexual orientation or gender identity
        1. Logan
        2. Midvale
        3. Moab
        4. Murray
        5. Park City
        6. Salt Lake City
        7. Taylorsville
        8. West Valley City

II. Recent Developments

a. Retaliation
    i. *Thompson v. North American Stainless, LP*, 2011 WL 197638 (2011) – Decided January 24, 2011
        1. Employee brought a Title VII action against his employer for retaliation, alleging that he was terminated after his fiancé, who also worked for the same employer, filed a gender discrimination charge with the EEOC. The U.S. Supreme Court, in an 8-0 decision, held that: (1) the employer's alleged act of firing the employee in retaliation against the fiancé, if proven, did constitute an unlawful retaliation under Title VII; (2) an "aggrieved" person under Title VII includes any person with an interest arguably

sought to be protected by the statutes; and (3) the employee fell within the zone of interests protected by Title VII. Justice Scalia, writing for the Court, declined to set a bright-line standard for determining which employees fall within the "zone of interests" protected by Title VII, stating that evaluating acts of retaliation "will often depend upon the circumstances."

b. Credit Histories
    i. *EEOC v. Kaplan Higher Education Corp.*, Civil Action No. 1:10-cv-02882 (N.D. Ohio 2010) – Filed December 22, 2010
        1. EEOC has alleged that Kaplan engaged in a pattern or practice of unlawful discrimination y refusing to hire a class of black applicants nationwide based on their credit history. Kaplan contends that it conducts background checks on all applicants, regardless of race, and that the use of credit reports is a necessary component of its background checks into applicants who would be dealing with financial matters, such as financial aid, if hired. The EEOC alleges that this practice violates Title VII because it has a discriminatory impact on applicants due to their race and it is neither job-related nor justified by a business necessity.

c. Disability Discrimination
    i. *EEOC v. Supervalu, Inc.*, No. 09 CV 5637 (N.D. Ill. 2009)
        1. The EEOC alleged that Jewel-Osco, a subsidiary of the Defendant, refused to allow qualified employees with disabilities who were on authorized disability, or who were eligible for it, to return to work if they had any work restrictions, and to have terminated employees if they reached the one-year mark on leave. The EEOC also charged that the company refused to allow qualified employees with disabilities to be assigned to temporary light duty jobs unless they were injured on the job.
        2. On January 5, 2011, the Court signed a consent order resolving the case. Supervalu Inc. agreed to pay $3.2 million to the 110 aggrieved workers.
        3. This is one of the largest settlements under the ADA.
        4. Each worker will receive $29,000 apiece on average. This per-person award is the highest ever in a discrimination case involving the ADA.

d. Gender Discrimination
    i. *Heinemann v. City of Concord*, Case No. C09 03383 (Superior Court of the State of California in and for the County of Contra Costa 2009)
        1. The highest ranking woman in the Concord Police Department, a 22-year veteran of the force, alleged that she and other female officers were powerless in a "de facto hierarchy" that was based upon a "presumption of male supremacy." She claimed that the department was "rife with overt hostility and disparate treatment toward female officers."
        2. On January 25, 2011, it was announced that the city had agreed to pay Lt. Heinemann and her attorneys $150,000, plus a

confidential amount to resolve her workers' compensation claim that was based on the same accusations.

3. In November 2010, the city settled another sexual harassment lawsuit brought by a former officer for $750,000.

e. Religious Discrimination

i. *Bailey v. Anaheim Ducks Hockey Club LLC* (Superior Court of the State of California in and for the County of Orange 2011) – Filed on January 25, 2011

1. Jewish hockey player sued the Anaheim Ducks and the Bakersfield Condors (an ECHL affiliate of the Ducks), alleging that his coaches made repeated anti-Semitic remarks, discriminated against him because of his religion, and denied him playing time because he was Jewish. His Complaint includes claims for religious discrimination, harassment based on religion, retaliation, failure to prevent harassment and discrimination, constructive termination and intentional infliction of emotional distress.

III. Case Law

a. Federal Cases

i. Class Action Cases

1. *AT & T Mobility v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)

a. Synopsis of Case

i. U.S. Supreme Court struck down California Supreme Court decision requiring classwide arbitration proceedings. The Court reasoned that the California decision was "inconsistent with the FAA" because it unduly interfered with arbitration by requiring the availability of class proceedings in arbitration. In other words, for the Court, class arbitration cannot be required under the FAA because it is as a practical matter not arbitration at all.

b. Take Away Points

i. Employers may want to use the *AT & T Mobility* case as a preemptive strike against potential class actions by employees by including a waiver of class claims in employment arbitration agreements. Employers must still ensure that the arbitration process that they are pushing employees into is procedurally and substantively fair.

ii. Employers might want to consider adding waiver provisions in their settlement agreements of wage & hour class actions as well. By including a provision that prevents settling class members from starting a class action in the future, the employer buys a bit of protection.

iii. Remaining Concerns
    1. By eliminating class actions, is the employer able (or ready) to face numerous individual arbitrations across the country?
    2. Is the employer ready to pay costs and attorneys fees as these types of arbitrations may require?

2. *Wal-Mart Stores, Inv. V. Dukes*, 131 S.Ct. 2541 (2011)
    a. Synopsis of Case
        i. The U.S. Supreme Court unanimously reversed the certification of a class action suit against Wal-Mart. The plaintiffs sought certification of a nationwide class of 1.5 million female Wal-Mart employees allegedly denied pay and promotions because of a corporate-wide "policy" of sex discrimination. The Court grounded its decision on the lack of commonality among the potential class members.
    b. Take Away Points
        i. Commonality requires more than an alleged common violation of the same law.
        ii. Class certification often requires some analysis of the merits of the underlying claims.
        iii. When a company has an announced policy against discrimination, and the alleged discrimination consists of management's deviation from that policy, it is difficult, if not nearly impossible, to find commonality among those individual decisions.
        iv. The larger the proposed class, the more difficult it is to establish a practice common to the class.
        v. General statistical evidence is insufficient to establish commonality, without something extra to tie those statistics to an issue common to the class.
        vi. Anecdotal evidence also must tie narrowly to a common issue.
        vii. Class action damages that must be individually litigated (such as back pay) cannot be litigated in a class action that seeks injunctive relief as its unifying point across the class.
        viii. It remains more important than ever to have company-wide policies and practices that reflect a strong prohibition on discrimination. This can be accomplished through vigilance and internal enforcing mechanisms.

ix. These practices should be communicated with some frequency (at least once or twice per year) not only to various regions or divisions, but also to employees as well.

x. Employers should keep up on further developments in the wage and hour collective actions – which differ from discrimination class actions. Will courts apply the logic of *Wal-Mart* to these types of cases? This question will be answered in the next few years.

ii. Application of ADAAA

1. *Strolberg v. U.S. Marshals Service*, 2010 WL 1266274 (D. Idaho 2010)
    a. The provisions of the ADAA were not intended to be applied retroactively, and could not be used to determine claims of discrimination based on disability that took place prior to January 1, 2009.
2. *Rickert v. Midland Lutheran College*, 2009 WL 2840528 (D. Neb. 2009)
    a. College volleyball coach brought claims of employment discrimination under both the ADAAA and the ADEA. The District Court held that the ADAA claims were barred, as the events leading up to the claim all took place prior to January 1, 2009, when the ADAA went into effect. Under the original provisions of the ADA, the Plaintiff failed to demonstrate a prima facie case of discrimination based on disability. And while the Plaintiff did establish a prima facie case for discrimination based on age, the Defendant was able to prove that it had legitimate, nondiscriminatory reasons for terminating the coach.

iii. Application of GINA – As this is a recent law, there is not a lot of case law interpretation at this time

1. *Benoit v. Pennsylvania Bd. Of Probation and Parole – West Div.*, 2010 WL481021 (E.D. Pa. 2010)
    a. Pro se Plaintiff made claims of discrimination under the Civil Rights Act of 1964, ADEA, ADA and GINA, among others. The Plaintiff failed to offer any substantiation for these claims, and the District Court dismissed the Complaint for failing to state a claim upon which relief could be granted. The Court did grant the Plaintiff 20 days to re-file an Amended Complaint.
2. *E.E.O.C. v. City of Greensboro*, 2010 WL 5169080 (M.D. N.C. 2010)
    a. This case does not involve claims made under the GINA. In granting Defendant's motion for summary judgment, the District Court does discuss the requirements for

retaining business records under both the ADA and GINA, stating that records such as requests for reasonable accommodations, application forms and other records pertaining to hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship must be kept for at least one year after they are made.

iv. Application of Lilly Ledbetter Fair Pay Act
    1. *Noel v. The Boeing Company*, 622 F.3d 266 (3rd Cir. 2010)
        a. Machinist for Boeing brought suit under the Civil Rights Act of 1964 for employment discrimination, claiming that he was passed over for promotion in favor of white employees. In analyzing the impact of the Fair Pay Act, the Third Circuit Court held that the Act did not apply to the Plaintiff's Title VII failure-to-promote claim, because the Plaintiff failed to demonstrate any nexus between the failure to promote and his disparate compensation. In addition, he failed to demonstrate that he received less pay than his white coworkers for performing the same work at the same grade level.

v. Associational Discrimination
    1. *Barrett v. Whirlpool Corp.*, 556 F.3d 502 (6th Cir. 2009)
        a. In February 2009, the Sixth Circuit published a favorable decision in a Title VII associational discrimination case in which the EEOC participated as amicus curiae. According to the lawsuit, three White workers at the Whirlpool plant in LaVergne, Tennessee, witnessed numerous instances of racial hostility and slurs directed at their Black coworkers. Because they maintained friendly relationships with, and engaged in various acts of advocacy on behalf of, their Black coworkers, they became targets of various threats and harassment by other White employees who were responsible for the racial hostility directed against their Black colleagues. The hostile conduct ranged from "cold shoulder" type behavior to the use of the term "nigger lover," references to the KKK, and direct threats on their lives, as well as being told to "stay with their own kind." The Sixth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the district court's decision granting summary judgment to the defendant on the White plaintiffs' Title VII claims alleging that they were subjected to a racially hostile work environment based on their association with their Black coworkers. Agreeing with the position taken by the Commission as amicus curiae, the court of appeals held that there is no

prerequisite degree or type of association between two individuals of different races in order to state a claim for associational discrimination or harassment, so long as the plaintiff can show that she was discriminated against because of her association with a person of a different race. The court of appeals also held that no particular degree or type of advocacy on behalf of individuals of a different race is required to state an associational discrimination claim based on this theory, again, so long as a plaintiff can show that she was discriminated against based on her advocacy on behalf of such individuals.

2. *EEOC v. Fire Mountain Restaurants LLC, d/b/a Ryan's Family Steakhouse*, No. 5:08-cv-00160-TBR (W.D. Ky. 2009)
    a. In June 2009, a restaurant, which was accused of creating a hostile work environment for Black, White, and female employees, settled an EEOC lawsuit for $500,000 and specific relief. According to the lawsuit, White employees were harassed because of their association with Black coworkers and family members, including being referred to as "n----r lovers" and "race traitors" by White managers. Additionally, Black workers were terminated because of their race, female workers were subjected to a sex-based hostile work environment, which included male managers making sexual advances and calling them gender-related epithets such as "b-----s.", and all complainants suffered retaliation for reporting the discrimination.

vi. Code Words

1. *EEOC v. Area Temps, Inc.*, No. 1:07cv2964 (N.D. Ohio 2010)
    a. In July 2010, one of the largest temporary placement agencies in Greater Cleveland area agreed to pay $650,000 to settle an employment discrimination lawsuit brought by the EEOC. The EEOC alleged that the temp agency violated federal law by matching workers with companies' requests for people of a certain race, age, gender and national origin and illegally profiling applicants according to their race and other demographic information using code words to describe its clients and applicants. The code words at issue included "chocolate cupcake" for young African American women, "hockey player" for a young White male, "figure skater" for White females, "basketball player" for Black males, and "small hands" for females in general.
2. *EEOC v. GMRI, Inc., d/b/a Bahama Breeze*, No. 1:08cv2214 (N.D. Ohio 2009)
    a. In December 2009, a national restaurant chain settled a racial harassment lawsuit brought by EEOC for $1.26

million and significant remedial relief in a case alleging repeated racial harassment of 37 Black workers at the company's Beachwood, Ohio location. In its lawsuit, the EEOC charged that Bahama Breeze managers committed numerous and persistent acts of racial harassment against Black employees, including frequently addressing Black staff with slurs such as "n----r," "Aunt Jemima," "homeboy," "stupid n----r," and "you people." Additionally, managers allegedly imitated what they perceived to be the speech and mannerisms of Black employees, and denied them breaks while allowing breaks to White employees. Despite the employees' complaints to management, the alleged race-based harassment continued. The three-year consent decree resolving the litigation contains significant injunctive relief requiring Bahama Breeze to update its EEO policies nationwide, provide anti-discrimination and diversity training to its managers and employees, and provide written reports regarding discrimination complaints.

vii. Disability

1. *EEOC v. Eckerd Corporation d/b/a Rite Aid*, Civil Action No. 1:10-cv-2816-JEC (N.D. Ga. 2010) – Filed September 9, 2010
    a. Cashier worked for Rite Aid for 18 years. Due to severe arthritic symptoms in her kneed, which limited her ability to walk and stand for long periods, she periodically used a stool while stationed behind the counter. She had been allowed to use the stool by her employer since 2001. In January 2009, a new district manager was assigned to her store and decided that the employer would no longer accommodate the cashier's disability because he "did not like the idea" that she used a stool. The cashier was terminated several weeks later because the manager refused to accommodate her disability "indefinitely." Employee alleges this violates employer's obligation to provide reasonable accommodation for her disability.
2. *EEOC v. Fisher, Collins & Carter*, Case No. 10-cv-2453 (D. Md. 2010) – Filed September 9, 2010
    a. Employer requested all employees respond to a questionnaire regarding their health conditions, medical issues and medications. Shortly thereafter, two employees were discharged after disclosing that they had diabetes and hypertension. One employee had worked for the company for 15 years. The other employee had worked for the company for 8 years. Throughout their employment, the two employees had successfully performed their jobs. Employees allege that the termination violates the ADA's purpose of eliminating

discrimination for people with disabilities who are qualified to do the job.

3. *EEOC v. IPC Print Services*, Case No. 10-cv-886 (W.D. Mich. 2010) – Filed September 9, 2010
    a. Employee, who had worked as a machinist for over 10 years, went on medical leave in 2008 to undergo chemotherapy treatment for cancer. In January 2009, employee asked to continue working part-time while he completed chemotherapy. Employer discharged him for exceeding the maximum hours of leave allowed by company policy. Employee alleges termination violates employer's obligation to provide reasonable accommodation for his disability.

viii. Discriminatory Customer/Patient Preference

1. *Chaney v. Plainfield Healthcare Center*, No. 09-3661 (7th Cir. 2010)
    a. In July 2010, Plaintiff Brenda Chaney and the EEOC as amicus curiae obtained a reversal of a summary judgment in favor of an employer in a Title VII case that "pit[ted] a [Black] health-care worker's right to a non-discriminatory workplace against a patient's demand for [W]hite-only health-care providers." In this race-based action, an Indiana nursing home housed a White resident who did not want any assistance from Black health-care staff. The facility complied with the patient's request by informing Plaintiff "in writing everyday that 'no Black' assistants should enter this resident's room or provide her with care." Plaintiff filed suit alleging that the facility's acquiescence to the racial biases of its residents is illegal and created a hostile work environment. She also asserted that her termination was racially motivated. On appeal, the Seventh Circuit unanimously rejected the facility's argument that Indiana's patient-rights law permitted such practice and remanded the case for trial because the "the racial preference policy violates Title VII by creating a hostile work environment and because issues of fact remain over whether race motivated the discharge."

ix. Discriminatory Hiring Practices

1. *EEOC v. Franke, Inc., d/b/a/ Franke Foodservice Systems*, No. 3:08-cv-0515 (M.D. Tenn. 2009)
    a. In March 2009, a manufacturer and distributor of foodservice equipment has offered permanent employment to an African American applicant and furnished other relief to resolve a race discrimination lawsuit alleging that the company refused to hire the Black applicant into a permanent position at its Fayetteville, Tenn., facility because he disclosed a felony conviction on his application – even though the company

hired a White applicant a year earlier who made a similar disclosure.

2. *EEOC v. Peabody W. Coal Co.*, Civil No. 06-17261 (9th Cir. 2010)
    a. In June 2010, the EEOC obtained a ruling by the Ninth Circuit that permits the Commission to pursue injunctive relief to stop a coal company mining in the Navajo Nation from discriminating in employment against non-Navajo Indians. In this Title VII case, EEOC claimed mineral lease provisions that require companies mining on the Navajo reservation in Arizona to give employment preferences to Navajos are unlawful. By honoring those provisions and refusing to hire non-Navajo Indians, Peabody discriminates based on national origin, in violation of Title VII of the 1964 Civil Rights Act, EEOC asserted. EEOC also can proceed with efforts to secure an injunction against future enforcement of the Navajo hiring preference, the court added. Should a court find a Title VII violation and issue such an injunction, Peabody and the Navajo Nation could file a third-party complaint against the Interior Secretary under Rule 14(a) to prevent the Secretary from seeking to enforce the lease provisions or cancel the leases, it said.
3. *EEOC v. Scrub, Inc.*, Civil Action No. 09 C 4228 (N.D. Ill. 2009)
    a. In July 2009, EEOC filed a lawsuit against a Chicago janitorial services provider, alleging that the company violated federal law by discriminating against African Americans in hiring. The Commission's administrative investigation revealed that, although African American workers were a significant segment of Scrub's labor market and applied for jobs in large numbers, they consistently made up less than two percent of Scrub's work force.

x. Hispanic Preference

1. *EEOC v. Little River Golf, Inc.*, No. 1:08CV00546 (M.D. N.C. 2009)
    a. In August 2009, a Pinehurst, N.C.-based support services company for condominium complexes and resorts paid $44,700 and will furnish significant remedial relief to settle a race and national origin discrimination lawsuit, alleging the company unlawfully discharged six housekeepers because of their race (African American) and national origin (non-Hispanic) and immediately replaced them with Hispanic workers.
2. *EEOC v. West Front Street Foods, d/b/a Compare Foods*, No. 5:08-cv-102 (W.D. N.C. 2009)
    a. In May 2009, a Statesville, NC grocery store agreed to settle for $30,000 a lawsuit alleging that it had fired a

White, non-Hispanic meat cutter based on his race and national origin and replaced him with a less-qualified Hispanic employee. In addition, the store has agreed to distribute a formal, written anti-discrimination policy, train all employees on the policy and employment discrimination laws, and send reports to the EEOC on employees who are fired or resign.

xi. Hostile Work Environment

1. *Armstrong v. Whirlpool Corp.*, No. 08-6376 (6th Cir. 2010)
    a. In January 2010, the Sixth Circuit affirmed in part and reversed in part a district court's decision granting summary judgment to defendant Whirlpool Corporation in a racial hostile work environment case in which the EEOC participated as amicus curiae. The alleged racial harassment largely involved a serial harasser who continually used racial slurs, including various permutations on "n----r," made references to the Ku Klux Klan openly and on a daily basis, and left a threatening message on a coworker's husband's answering machine. Other racially hostile incidents included White coworkers displaying the Confederate flag on their clothing and tow motors, threatening racial violence, making repeated references to the KKK and the n-word, telling of racist jokes, remarking that they wished they had a "James Earl Ray Day" as a holiday, and "laughing and talking about the Black guy that got drugged [sic] behind a truck in Texas[,] ... saying he probably deserved it." Several of the Black plaintiffs also testified about the presence of racial graffiti in the plant bearing similar messages, including "KKK everywhere," "go home sand niggers," and "Jesus suffered, so the n----rs must suffer too, or ... Blacks must suffer, too."
2. *EEOC v. Big Lots, Inc.*, CV-08-06355-GW(CTx) (C.D. Cal. 2010)
    a. In February 2010, Big Lots paid $400,000 to settle a race harassment and discrimination lawsuit in which the EEOC alleged that the company took no corrective action to stop an immediate supervisor and co-workers, all Hispanic, from subjecting a Black maintenance mechanic and other Black employees to racially derogatory jokes, comments, slurs and epithets, including the use of the words "n----r" and "monkey," at its California distribution center.
3. *EEOC v. Ceisel Masonry*, No. 06 C 2075 (N.D. Ill. 2009); *Ramirez v. Ceisel Masonry*, No. 06 C 2084 (N.D. Ill. 2009)
    a. In May 2009, a masonry company agreed to pay $500,000 to settle a Title VII lawsuit alleging race and national origin harassment of Hispanic employees. The

suit charged that the foremen and former superintendent referred to the company's Latino employees with derogatory terms such as "f---ing Mexicans," "pork chop," "Julio," "spics," "chico" and "wetback." In addition, former employees alleged that Hispanic workers were routinely exposed to racist graffiti, which the company never addressed. The three-year decree enjoins the company from future discrimination and retaliation on the basis of race or national origin and mandates anti-discrimination and investigation training for all of its employees and supervisors.

4. *EEOC v. E&D Services, Inc.*, No. SA-08-CA-0714-NSN (W.D. Tex. 2009)
    a. In August 2009, a Mississippi-based drilling company agreed to pay $50,000 to settle a Title VII lawsuit, alleging that four employees, three White and one Black, experienced racial harassment and retaliation while assigned to a remote drilling rig in Texas. The harassment included being subjected to racial taunts and mistreatment from Hispanic employees and supervisors and having their safety threatened because the supervisors conducted safety meetings in Spanish only and refused to interpret for them in English. Told that they needed to learn Spanish because they were in South Texas, the employees said that instead of addressing their complaints of discrimination, they were fired. The company agreed to establish an effective anti-discrimination policy and to provide anti-discrimination training to its employees.
5. *EEOC v. Nordstrom, Inc.*, No. 07-80894-CIV-RYSKAMP/VITUNAC (S.D. Fla. 2009)
    a. In April 2009, high-end retailer Nordstrom settled an EEOC lawsuit alleging that it permitted the harassment despite complaints by Hispanic and Black employees about a department manager who said she "hated Hispanics" and that they were "lazy" and "ignorant" and that she didn't like Blacks and told one employee, "You're Black, you stink." Under the terms of the settlement, Nordstrom will pay $292,000, distribute copies of its anti-discrimination policy to its employees, and provide anti-harassment training.
6. *EEOC v. NPMG, Acquisition Sub, LLC*, No. CV 08-01790-PHX-SRB (D. Ariz. 2009)
    a. In September 2009, a Phoenix credit card processing company agreed to pay $415,000 and furnish significant remedial relief to settle a race harassment lawsuit, in which the EEOC charged that the company subjected a group of African American workers to racial slurs and

epithets. According to one discrimination victim: "My supervisors often referred to my fellow African-American employees and me as 'n-----rs' and 'porch monkeys' and forced us to play so-called 'Civil War games' where employees were divided into North and South. They also referred to Black children or mixed-race children as 'porch monkeys' or 'Oreo babies.' On several occasions, I was told to turn off my 'jigaboo music."

7. *EEOC v. Pace Service, L.P.*, No. 4:08cv2886 (S.D. Tex. 2010)
    a. In April 2010, a Houston-area construction company paid $122,500 and will provide additional remedial relief to resolve a federal lawsuit alleging race, national origin and religious discrimination. The EEOC's lawsuit alleged that the company discriminated against Mohammad Kaleemuddin because he is of the Islamic faith and of East Indian descent, and against 13 other employees because they are Black or Hispanic when a supervisor referred to Kaleemuddin as "terrorist," "Taliban," "Osama" and "Al-Qaeda," to the Black employees as "n----s" and to Hispanics as "f-----g Mexicans." In addition to monetary relief, the consent decree required the owner to provide a signed letter of apology to Kaleemuddin and that the alleged harassing manager alleged be prohibited from ever working again for the company. The company will also provide employee training designed to prevent future discrimination and harassment on the job.
8. *EEOC v. Professional Building Systems of North Carolina, LLC*, Civil Action No. 1:09-cv-00617 (M.D. N.C. 2010)
    a. In April 2010, the EEOC settled its lawsuit against Professional Building Systems for $118,000 and significant non-monetary relief after it had identified at least 12 Black employees who had been subjected to racial harassment there. According to the EEOC's complaint, at various times between mid-2005 and 2008, Black employees were subjected to racial harassment that involved the creation and display of nooses; references to Black employees as "boy" and by the "N-word"; and racially offensive pictures such as a picture that depicted the Ku Klux Klan looking down a well at a Black man. In its complaint, the EEOC alleged that the managers of the company not only knew about the harassment and took no action to stop or prevent it, but also that a manager was one of the perpetrators of the harassment.
9. *EEOC v. S&H Thompson, Inc., d/b/a Stokes-Hodges Chevrolet Cadillac Buick Pontiac GMC*, (S.D. Ga. 2010)
    a. In January 2010, a Georgia car dealership agreed to pay $140,000 to settle a race discrimination suit. In this case,

the EEOC alleged that a White consultant visited the car dealership three to four times a week and never missed an opportunity to make racially derogatory comments towards the Black sales manager and almost always in the presence of other people. After the Black sales manager complained about the derogatory comments, two White managers asked the consultant to stop his discriminatory behavior. The consultant ignored their requests to cease and continued to make the derogatory comments at every opportunity. The dealership denied any liability or wrongdoing but will provide equal employment opportunity training, make reports, and post anti-discrimination notices.

xii. Job Segregation

1. *EEOC v. John Wieland Homes and Neighborhoods, Inc.*, No. 1-09-cv-1151 (N.D. Ga. 2010)
    a. In June 2010, EEOC and an Atlanta home builder settled for $378,500 a suit alleging the company unlawfully discriminated by assigning Black sales employees to neighborhoods based on race, failing to promote African Americans or women to management, and harassing an employee who complained.
2. *EEOC v. Papermoon-Stuart, Inc.*, No. 0:09-cv-14316 (S.D. Fla. 2009)
    a. In September 2009, EEOC sued a Virginia-based entertainment club and its related companies for allegedly subjecting two Black doormen to segregated assignments that forced them to work in the back instead of at the club entrance, to offensive racial slurs, and to complaints by managers that "[B]lack music makes the club look bad." According to the suit, company managers did not stop the racial harassment and, instead, either forced out or fired those who complained.

xiii. Race/Age Discrimination

1. *EEOC v. Spencer Reed Group*, No. 1:09-CV-2228 (N.D. Ga. 2010)
    a. In June 2010, the Equal Employment Opportunity Commission and a Kansas-based national employment staffing firm settled for $125,000 a case on behalf of a White, 55-year-old former employee who allegedly was treated less favorably than younger Black colleagues and fired when she complained. According to the Commission's lawsuit, the staffing company unlawfully discriminated against a senior functional analyst, who was the oldest employee and only Caucasian in the department, because of her race and age in violation of Title VII and the ADEA when a young, African American

supervisor subjected her to different treatment and terminated her when she complained.

xiv. Race/Gender Discrimination

1. *EEOC v. Whirlpool Corp.*, Civil Action No. 3:06-0593 (M.D. TEnn. 2009)

   a. In December 2009, EEOC won a court judgment of over $1 million against Whirlpool Corporation in a race and sex discrimination case. During the four-day trial, the evidence showed that a Black female employee reported escalating offensive verbal conduct and gestures by her White male coworker over a period of two months before he physically assaulted her at the Tennessee-based facility; four levels of Whirlpool's management were aware of the escalating harassment; Whirlpool failed to take effective steps to stop the harassment; and the employee suffered devastating permanent mental injuries that will prevent her from working again as a result of the assault and Whirlpool's failure to protect her.

xv. Retaliation

1. *EEOC v. Mountaire Farms of North Carolina Corp.*, Civil Action No. 7:09-CV-00147 (E.D. N.C. 2009)

   a. In September 2009, EEOC filed a lawsuit against a North Carolina poultry processor, alleging that it engaged in unlawful retaliation when it gave an African American employee an unjustifiably negative performance evaluation shortly after she filed two internal complaints with management about her White supervisor's use of racially offensive language about her and in her presence and when it discharged her two weeks after she filed an EEOC charge because of her dissatisfaction with the company's response to her discrimination complaints.

xvi. Systemic Racial Discrimination

1. *EEOC v. Albertsons LLC*, Civil Action No. 06-cv-01273, No. 06-cv-00640, and No. 08-cv-02424 (D. Colo. 2009)

   a. In December 2009, a national grocery chain paid $8.9 million to resolve three lawsuits collectively alleging race, color, national origin and retaliation discrimination, affecting 168 former and current employees. According to the lawsuits, minority employees were repeatedly subjected to derogatory comments and graffiti. Blacks were termed "n-----s" and Hispanics termed "s---s;" offensive graffiti in the men's restroom, which included racial and ethnic slurs, depictions of lynchings, swastikas, and White supremacist and anti-immigrant statements, was so offensive that several employees would relieve themselves outside the building or go home at lunchtime rather than use the restroom. Black and Hispanic

employees also were allegedly given harder work assignments and were more frequently and severely disciplined than their Caucasian co-workers. Lastly, EEOC asserted that dozens of employees complained about the discriminatory treatment and harassment and were subsequently given the harder job assignments, were passed over for promotion and even fired as retaliation.

2. *EEOC v. Area Erectors, Inc.*, Civil Action No. 1:07-cv-02339 (N.D. Ill. 2009)
    a. In May 2009, an Illinois construction company agreed to pay $630,000 to settle a class action race discrimination suit, alleging that it laid off Black employees after they had worked for the company for short periods of time, but retained White employees for long-term employment. The three-year consent decree also prohibits the company from engaging in future discrimination and retaliation; requires that it implement a policy against race discrimination and retaliation, as well as a procedure for handling complaints of race discrimination and retaliation; mandates that the company provide training to employees regarding race discrimination and retaliation; and requires the company to provide periodic reports to the EEOC regarding layoffs and complaints of discrimination and retaliation.

xvii. Terms and Conditions

1. *EEOC v. Material Resources, LLC, d/b/a Gateway Co-Packing Co.*, No. 3:08-245-MJR (S.D. Ill. 2009)
    a. In August 2009, a Washington Park, Ill., packaging and warehousing company agreed to pay $57,500 and provide training to settle a race discrimination and retaliation lawsuit alleging that the company failed to provide a Black employee the pay raise and health insurance coverage provided to his White co-workers, and then fired him in retaliation for filing a charge of race discrimination with the EEOC.
2. *EEOC v. Noble Metal Processing, Inc.* No. 2:08-cv-14713 (E.D. Mich. 2010)
    a. In June 2010, a Warren, Mich., automotive supplier paid $190,000 to settle a race discrimination and retaliation lawsuit in which the EEOC alleged that the supplier repeatedly overlooked qualified non-White employees, including a group of Black employees and a Bangladeshi employee, for promotions to the maintenance department. In addition, a White employee who opposed this type of race discrimination and complained that managers in the maintenance department were using

racial slurs allegedly was fired shortly after the company learned of his complaints.

3. *EEOC v. Race, LLC, d/b/a Studsvik, LLC*, Civil Action No. 2:07-cv-2620 (W.D. Tenn. 2009)
    a. In December 2009, a Tennessee company that processes nuclear waste agreed to settle claims by the EEOC that Black employees were subjected to higher levels of radiation than others. Specifically, the EEOC alleged that, in addition to paying them less and permitting a White manager to refer regularly to them with the N-word and other derogatory slurs, such as "boy," the company manipulated dosimeters of Black employees assigned to work with radioactive waste to show lower levels of radiation than the actual ones. Under the agreement, 23 Black employees will receive $650,000.
4. *Frazier v. United States Department of Agriculture*, EEOC Appeal No. 0120083270 (2009)
    a. In June 2009, the EEOC overturned an AJ's finding of no discrimination in a Title VII race discrimination case. Complainant alleged he was discriminated against on the bases of race (African-American) and retaliation when he was not selected for an of four vacant Risk Management Specialist positions. Complainant applied for the position, was rated as qualified, interviewed for the position, and was not selected. All four of the selectees were White. The agency found no discrimination and complainant appealed. The Commission found that the agency failed to provide a legitimate, non-discriminatory reason for the non-selection. The agency stated that the selectees were chosen because their skills and qualifications fit the agency's needs. The Commission found that the agency's reasons were not sufficiently clear so that complainant could be given a fair opportunity to rebut such reasons. The Commission also noted that the agency did not produce any rating sheets from the interview panel, and that complainant appeared to possess similar qualifications to the other selectees. Thus, the Commission found that the prima facie case and complainant's qualifications, combined with the agency's failure to provide a legitimate, nondiscriminatory reason for complainant's non-selection, warranted a finding of race discrimination. Because of this finding, the decision found it unnecessary to address the basis of retaliation. As remedies, the agency was ordered to place complainant into the Risk Management Specialist position with back pay and consideration of compensatory damages, EEO training to responsible agency officials, consideration of discipline for

responsible agency officials, attorneys fees order, and posting notice.

5. *Thalamus Jones v. United States Department of Energy*, EEOC Appeal No. 0720090045 (2010)
    a. In March 2010, the EEOC upheld an Administrative Judge's determination that a federal agency discriminated against a Black employee on the basis of race when it terminated the complainant's participation in a training program. The record showed that complainant was not rated as "marginal" and that the Manager who made the decision to terminate complainant conceded that complainant passed all required tests. Further, the Manger did not consult with the instructors before making the decision, but instead relied upon one individual who was clearly hostile toward complainant and who the AJ found was not credible. Additionally, the environment was not favorable to Black recruits. Two witnesses testified that they heard someone remark "one down and two to go" when complainant turned in his equipment following his termination. At that time, there were only three Black students in the 31-person class. One week before the class was to graduate, the third and last Black student was removed from the program. The record also revealed that it was the agency's policy to afford remedial training and an opportunity to correct behavior before removing candidates from the training program. The record indicated that the policy was followed with respect to White comparatives, but was not followed in complainant's case. The agency was ordered to, among other things, offer complainant reinstatement into the next training program, with back pay.

b. Utah Cases
    i. *Strebel v. Roosevelt City Police Department*, 2010 WL 5140490 (D. Utah 2010)
        1. Former city police officer brought claims of alleged discrimination based on disability and gender. She also brought a retaliation claim because, she claimed, the Defendant police department failed to assign her hours as a result of her discrimination complaints. The District Court granted the Defendant's motion for summary judgment as to the creation of a hostile work environment based on gender and disability discrimination, as the harassment was deemed not severe and pervasive. The Court denied the Defendant's motion for summary judgment as to discrimination and retaliation. The Court held that there were the following disputed issues of fact precluding summary judgment: (1) whether the Plaintiff qualified as a person with a disability under the ADA;

(2) whether running and jumping were "essential elements" of the Plaintiff's job description; and (3) whether the failure to schedule the Plaintiff amounted to a "constructive" discharge.

ii. *Teeter v. Lofthouse Foods*, 691 F.Supp.2d 1314 (D. Utah 2010)

1. Employee brought action claiming that he was terminated because of his hepatitis C, in violation of the ADA. The District Court held that hepatitis C did not substantially limit the employee's major life activities. As a result, the employee was not "disabled" under the terms of the ADA. In addition, the Court held that there was no evidence that any person involved in the decision to terminate the employee at the Defendant company had any knowledge of the employee's illness or his course of treatment. (NB: This decision does not make mention of the ADAAA. It draws heavily on the U.S. Supreme Court's decision in *Toyota Motor Mfg. KY v. Williams*. Under the ADAAA's more liberal construction of "disability," a diagnosis of hepatitis C might be construed as a disability.)

iii. *James v. Frank's Westates Services, Inc.*, 2010 WL 3981835 (D. Utah 2010)

1. Female employees brought suit against their employer and its president, alleging that the president sexually harassed them. They asserted causes of action under Title VII for creating a hostile work environment, negligent training, supervision and retention, and for retaliation. They also asserted a cause of action under Utah law for intentional infliction of emotional distress. The District Court held that the Plaintiffs' vicarious liability claim precluded pursuing an alternate theory based on negligent training, retention and supervision, and that it did not have authority to hear their unexhauseted retaliation claim. The Court denied the Defendant's motion for summary judgment regarding the following issues: 91) creation of a hostile work environment; (2) Actual tangible employment action taken against one plaintiff; (3) Constructive tangible employment action taken against two other plaintiffs; (4) whether plaintiffs unreasonably failed to take advantage of preventive or corrective opportunities to address their complaints; and (5) plaintiffs' intentional infliction of emotional distress claims.